



2024:DHC:6612



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on : 13th August 2024***

Pronounced on : 28th August 2024

+ **BAIL APPLN. 2386/2024**

DAYANAND

.....Petitioner

Through: Mr. Shiv Chopra, Advocate, Mr. Siddharth Arora, Ms. Aadhya Khanna, and Mr. Aksam Jindal, Advocates.

versus

STATE NCT OF DELHI

.....Respondent

Through: Mr. Pradeep Gahalot, APP for State with IO Geeta Yadav, PS: Sultanpuri.

**CORAM:
HON'BLE MR. JUSTICE ANISH DAYAL**

JUDGMENT

ANISH DAYAL, J.

1. This decision dismisses present bail application seeking regular bail in FIR No. 1223/2019 dated 15th December 2019 registered at Police Station [**“PS”**] Sultanpuri under Sections 323 and 376 of the Indian Penal Code, 1860 [**“IPC”**], and Section 6 of the Protection of Children from Sexual Offences Act, 2012 [**“POCSO Act”**].



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Background Facts

2. As per the case of prosecution, on 15th December 2019, information was received at PS Sultanpuri *vide* DD No. 41A regarding sexual assault of a minor girl. SI Geeta, along with staff reached Sanjay Gandhi Hospital, Mongol Puri, where mother of the victim was found, and medical examination of the victim *vide* MLC No. 203/1295/9 was going on. It was informed that applicant/accused made physical relations with the prosecutrix at his address. Statement of prosecutrix was recorded wherein she stated that while she was playing with her friend Ms. 'P' who resides in the neighbourhood, P's father (applicant/accused) took the prosecutrix to his room, removed her undergarments, applied oil over and in her vagina, and inserted his finger as well as his penis. The accused then slapped her, too, and sent her back.

3. During investigation, the Forensic Science Laboratory [**"FSL"**] crime team called for an inspection of the scene of crime. Accordingly, exhibits were seized from the scene and same were sealed by the FSL team; thereafter, aforesaid FIR was registered on 15th December 2019.

4. Applicant/accused was arrested on 16th December 2019; medical examination of the accused was conducted *vide* MLC no. 20425/2019; and after production before Court, was sent to judicial custody. As per the FSL Reports, seized exhibits were sent for forensic examination wherein traces of mustard oil were found *inter alia* on the bedsheet seized from the scene of crime, as also the applicant/accused's clothes. The FSL Reports further state that the blood of prosecutrix was found

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inter alia on the prosecutrix's *pajami* as well as clothes of the applicant/accused.

5. Age of prosecutrix was also verified from the concerned school during investigation. Verification showed her age to be about 5 years and 8 months old on the date of the alleged incident; school records showed prosecutrix's date of birth to be 01st April 2014.

6. Statement of the prosecutrix was recorded under Section 164, Code of Criminal Procedure, 1973 [**"CrPC"**] at Rohini courts, Delhi where she supported her previous version contained in the FIR. Chargesheet was filed on 22nd January 2020 and charges were framed against applicant accused on 18th March 2021. FSL Examination Report Nos. SFSL DLH/12655/BIO/2888/19 Bio No. 2978/2019 dated 27th March 2020 [**"1st FSL Report"**] and SFSL DLH/12655/CHEM/25/20/BIO/2888/2019 dated 29th June 2020 [**"2nd FSL Report"**] was received at PS Sultanpuri and submitted before the Trial Court.

7. The case is at the final stage of prosecution evidence; out of 18 witnesses, 14 have been examined, and the next date of hearing before the Trial Court is 05th September 2024.

Submissions on behalf of Applicant/Accused

8. While counsel for applicant/accused did not dispute the minor age of the prosecutrix, he contended that no traces of mustard oil were found in medical examination of the applicant/accused as also from the examination of the victim. It was submitted that testimony of the prosecutrix/victim was inconsistent with her statement recorded under



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Section 164 CrPC, in that she did not state that the applicant/accused had inserted his penis, and that since she was of tender age, she was prone to tutoring. It was also argued that there was inconsistency between the testimony of PW-2 (prosecutrix) and PW-6 (mother of the prosecutrix), in that PW-2 stated that he had inserted both his finger and his penis inside her vagina, while PW-6 stated that her daughter had mentioned that he (applicant/accused) had only inserted his private part inside her vagina.

9. It was further stated in the bail application that there were other inconsistencies as well, in that while PW-6 states that when she took off the *pajami* of her daughter, she found blood stains, whereas PW-2 had stated that the applicant/accused had removed her underwear.

Submissions on behalf of State

10. Additional Public Prosecutor [“**APP**”] for the State refuted the above contentions, and drew attention of this Court to the FSL Reports submitted examining the items seized from the scene of crime. As per the 1st FSL Report, Exhibit 4 ‘one dirty baby *pajami*’ belonging to the prosecutrix, and Exhibit 8 ‘one very dirty jacket’, Exhibit 9 ‘one dirty T-shirt’, Exhibit 10a ‘one dirty pant’, and Exhibit 10b ‘one dirty sweater’ all belonging to the applicant/accused were found to contain mustard oil which the applicant/applied on the prosecutrix’s private parts before committing the offence alleged.

11. Furthermore, it was contended, on the basis of the 2nd FSL Report, that the bedsheets (Exhibits 1 and 2) and blanket (Exhibit 3) seized from the scene of crime, clothes of the prosecutrix (Exhibit 4), as well as shirt



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(Exhibit 5e2), sweater (Exhibit 5e3), and *baniyan* (vest) (Exhibit 5e5) of the applicant/accused *inter alia* had traces of blood of the prosecutrix.

12. Aside from this, APP for State pointed out to the statement of PW-2 who, at the time of giving her testimony, was 8 years of age and studying in class 3rd. She clearly stated that she had gone to play with her friend 'P' when the latter's father, the applicant/accused, took her to the room upstairs when there was nobody there. First, the applicant took off her underwear and then applied oil on vagina and then inserted his finger which pained her a lot. Further, she identified the accused in Court. She further stated that she had bled when he had inserted his finger.

13. PW-3, the Medical Officer, proved the MLC prepared by his associate, and identified the signatures thereupon. PW-6 corroborates the testimony of the prosecutrix herself. She states that her daughter was 5 years of age and she went missing and when she was trying to find her, she found her coming crying from the house of the applicant/accused. Her daughter reported to her about the incident and then she found that there was blood on her underwear and private parts as well.

Analysis

14. Heard counsel on behalf of applicant/accused and State, and perused the material placed before this Court.

15. Perusal of the FSL Reports provided by APP for the State shows that traces of mustard oil on the bedsheet seized from the scene of crime and the jacket, T-shirt, pants, and sweater of the applicant/accused; and blood of the prosecutrix was found on the bedsheets seized from the



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scene of crime, *pajami* of the prosecutrix and T-shirt, sweater, and pant of the applicant/accused.

16. In *Prasanta Kumar Sarkar v. Ashis Chatterjee & Anr.* (2010) 14 SCC 496, the Apex Court rendered factors that Court ought to keep in mind while considering an application for bail; relevant portions of the said decision are extracted as under:

“9. We are of the opinion that the impugned order is clearly unsustainable. It is trite that this Court does not, normally, interfere with an order passed by the High Court granting or rejecting bail to the accused. However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.



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[See *State of U.P. v. Amarmani Tripathi* [(2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)] (SCC p. 31, para 18), *Prahlad Singh Bhati v. NCT of Delhi* [(2001) 4 SCC 280 : 2001 SCC (Cri) 674] , and *Ram Govind Upadhyay v. Sudarshan Singh* [(2002) 3 SCC 598 : 2002 SCC (Cri) 688].]"

(emphasis added)

17. The decision in ***Prasanta Kumar Sarkar*** (*supra*) was cited with approval in a recent decision of the Supreme Court in ***Bhagwan Singh v. Dilip Kumar alias Deepu alias Deepak and Anr.*** 2023 INSC 761 while dealing with an appeal related to cancellation of bail in a POCSO matter. While doing so, Court also noted in ***Bhagwan Singh*** (*supra*) that grant of bail is a discretionary relief which ought to be adjudicated in terms of the facts and circumstances of the particular case; relevant portions are as under:

12. The grant of bail is a discretionary relief which necessarily means that such discretion would have to be exercised in a judicious manner and not as a matter of course. The grant of bail is dependant upon contextual facts of the matter being dealt with by the Court and may vary from case to case. There cannot be any exhaustive parameters set out for considering the application for grant of bail.

(emphasis added)

18. In consonance with the factors as reproduced hereinabove, as well as jurisprudence regarding bail as propounded by Courts in various cases, this Court is not inclined to grant bail to the applicant/accused in terms of the discussion below.

19. At this stage of determination of a bail application, detailed appreciation of evidence is not necessary, but only a *prima facie* view

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ought to be take. Same flows from a decision of the Supreme Court in ***Masroor v. State of Uttar Pradesh*** (2009) 14 SCC 286; relevant portions are extracted below:

“13. It is trite to state that the court granting bail has to exercise its discretion in a judicious manner with care and caution and not as a matter of course. Though at the stage of granting bail an elaborate examination of evidence and detailed reasons touching the merit of the case, which may prejudice the accused, should be avoided, but there is a need to indicate in such order reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence.”

(emphasis added)

20. Decision in ***Masroor*** (*supra*) was cited with approval by the Apex Court in a recent decision in ***Ms. X v. State of Maharashtra and Anr.*** 2023 INSC 252 while setting aside anticipatory bail granted to an accused in a POCSO matter.

21. In ***Dharmander Singh v. State (Govt. of NCT of Delhi)*** 2020:DHC:2838, a coordinate Bench of this Court discusses a significant factor that needs to be addressed when offence alleged is under the POCSO Act. Court referred to the presumption of guilt as envisaged in Section 29 as also ‘*culpable mental state*’ as mentioned in Section 30 POCSO Act. Holding that while considering a bail plea *after* charges have been framed, presumption of guilt under Section 29 POCSO Act would get triggered and will have to be taken into consideration, this Court enlisted factors pertinent to consider while granting/refusing bail in a POCSO matter; relevant portions of the decision are extracted under:



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“74. As always, when faced with such dilemma, the court must apply the golden principle of balancing rights. In the opinion of this court therefore, at the stage of considering a bail plea after charges have been framed, the impact of section 29 would only be to raise the threshold of satisfaction required before a court grants bail. What this means is that the court would consider the evidence placed by the prosecution along with the charge-sheet, provided it is admissible in law, more favorably for the prosecution and evaluate, though without requiring proof of evidence, whether the evidence so placed is credible or whether it ex facie appears that the evidence will not sustain the weight of guilt.

75. If the court finds that the evidence adduced by the prosecution is admissible and ex facie credible, and proving it during trial is more a matter of legal formality, it may decide not to grant bail. If, on the other hand, the court finds that the evidence before it, is either inadmissible or, is such that even if proved, it will not bring home guilt upon the accused, it would grant bail.

76. In a given case, the accused may, of his own volition, be willing to disclose his defence even while arguing for bail, to prevail upon the court; in which case, the task of the court would become easier. If however, the accused decides not to disclose his evidence at that stage, he would suffer the consequences of the presumption of guilt engrafted in section 29.

77. Though the heinousness of the offence alleged will beget the length of sentence after trial, in order to give due weightage to the intent and purpose of the Legislature in engrafting section 29 in this special statute to protect children from sexual offences, while deciding a bail plea at the post-charge stage, in addition to the nature and quality of the evidence before it, the court would also factor in certain real life considerations, illustrated below, which would tilt the balance against or in favour of the accused:



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a. the age of the minor victim : the younger the victim, the more heinous the offence alleged;

b. the age of the accused : the older the accused, the more heinous the offence alleged;

c. the comparative age of the victim and the accused : the more their age difference, the more the element of perversion in the offence alleged;

d. the familial relationship, if any, between the victim and the accused : the closer such relationship, the more odious the offence alleged;

e. whether the offence alleged involved threat, intimidation, violence and/or brutality;

f. the conduct of the accused after the offence, as alleged;

g. whether the offence was repeated against the victim; or whether the accused is a repeat offender under the POCSO Act or otherwise;

h. whether the victim and the accused are so placed that the accused would have easy access to the victim, if enlarged on bail : the more the access, greater the reservation in granting bail;

i. the comparative social standing of the victim and the accused : this would give insight into whether the accused is in a dominating position to subvert the trial;

j. whether the offence alleged was perpetrated when the victim and the accused were at an age of innocence : an innocent, though unholy, physical alliance may be looked at with less severity;

k. whether it appears there was tacit approval-in-fact, though not consent-in-law, for the offence alleged;

l. whether the offence alleged was committed alone or along with other persons, acting in a group or otherwise;

m. other similar real-life considerations.



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78. The above factors are some cardinal considerations, though far from exhaustive, that would guide the court in assessing the egregiousness of the offence alleged; and in deciding which way the balance would tilt. At the end of the day however, considering the myriad facets and nuances of real-life situations, it is impossible to cast in stone all considerations for grant or refusal of bail in light of section 29. The grant or denial of bail will remain, as always, in the subjective satisfaction of a court; except that in view of section 29, when a bail plea is being considered after charges have been framed, the above additional factors should be considered.”

(emphasis added)

22. Factors propounded by this Court in ***Dharmander Singh*** (*supra*) are instructive. Applying aforementioned factors to the present case, it is pertinent to note that – ***firstly***, prosecutrix/victim was of a tender age of 5 years at the time of commission of the alleged offence; ***secondly***, age of applicant/accused was about 28 years; ***thirdly***, age difference between the prosecutrix and the applicant/accused is about 25 years; and ***fourthly***, prosecutrix and applicant/accused reside in the same neighbourhood, with the latter being the father of the former’s friend/playmate; hence, if the accused is enlarged on bail, he will have easy access to the prosecutrix/victim and her family.

23. In light of above principles, this Court has also perused the statements of PW-2 (prosecutrix), PW-6 (mother of prosecutrix), as well as the MLC as pointed out by the APP for State. At this stage, categorical appreciation of evidence is not warranted; *prima facie* view of the evidence recorded by the Trial Court, thus far, sways the mind of this Court to not grant bail to the applicant/accused at this stage.



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24. Testimony of the prosecutrix/victim, who was a young child of merely 5 years when the alleged incident happened, and 8 years when her statement was recorded under Section 164 CrPC, is consistent with the statements given by her at the time of lodging the FIR. There is no reason for this Court to doubt the veracity of the same, nor is there any reason to accept the applicant's contention that testimony of a child would not be reliable because of minor inconsistencies, so far as grant of bail is considered. Not only did the prosecutrix give a coherent testimony with the events after the alleged incident when she ran away from the house of applicant/accused, but it was also corroborated by her mother in her recorded testimony.

25. Examination *vide* the FSL Reports is also potent in having found traces of mustard oil on the bedsheet seized from the scene of crime and the jacket, T-shirt, pants, and sweater of the applicant/accused, as also blood of prosecutrix was found on the bedsheets seized from the scene of crime, *pajami* of the prosecutrix, and T-shirt, sweater, and *baniyan* of the applicant/accused. Findings of the FSL crime team *prima facie* corroborate with testimonies of the prosecutrix herself, being PW-2, as well as the mother's i.e. PW-6.

Conclusion

26. Considering the discussion above, this Court is not inclined to grant bail to the accused, particularly keeping in mind the sensitive nature of the offence and the vulnerable age of the prosecutrix, which is not disputed by the applicant/accused, as also considering that he is the father of the prosecutrix's friend who lives in the same neighbourhood.



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27. The fact that he is in custody for five years, is not the only relevant fact in this case; Courts have repeatedly held that the reality of the offense has to be considered for the purposes of grant of bail keeping in mind various factors as is evident from the decisions are referred to in the discussion above and the authorities cited therein.

28. Needless to state that observations made by this Court are for the purposes of deciding this bail application. No observations are made on the merits of the matter, considering that the trial is underway and is yet to conclude.

29. In light of the above discussion and assessment, this bail application is dismissed.

30. Judgment be uploaded on the website of this Court.

(ANISH DAYAL)
JUDGE

AUGUST 28, 2024/SM/sc